

The Role of Procedural Laws in Asset Recovery: A Roadmap for Tanzania

Research Paper Submitted in Partial Fulfilment of the Degree of Master of Laws: Transnational
Criminal Justice and Crime Prevention - An International and African Perspective

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Declaration

I, AWAMU AHMADA MBAGWA, declare that 'The Role of Procedural Laws in Asset Recovery: A Roadmap for Tanzania' is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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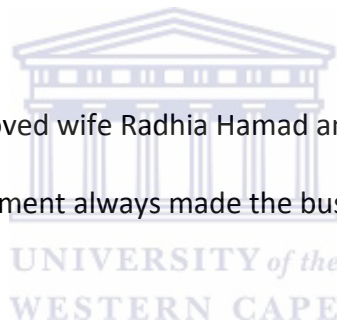
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Key Words

Asset Recovery

Confiscation

Forfeiture

Seizure

Freezing

Tracing

Identification

Preservation

Property

Procedural law



List of Abbreviations and Acronyms

AG	: Attorney General
AMLA	: Anti-Money Laundering Act
ATPA	: Anti-Trafficking in Persons Act
AU Convention	: African Union Convention on Preventing and Combating Corruption
CPA	: Criminal Procedure Act
DPP	: Director of Public Prosecutions
EOCC Act	: Economic and Organised Crime Control Act
FATF	: Financial Action Task Force
MACMA	: Mutual Assistance in Criminal Matters Act
NPSA	: National Prosecutions Service Act
OECD	: Organisation for the Economic Co-operation and Development
PCCA	: Prevention and Combating of Corruption Act
POCA	: Proceeds of Crime Act
PTA	: Prevention of Terrorism Act
SADC Protocol	: Southern African Development Community Protocol against Corruption
UNCAC	: United Nations Convention against Corruption
UNTOC	: United Nations Convention against Transnational Organised Crime

UNICRI : United Nations Interregional Crime and Justice Research Institute

CDPP : Commonwealth Director of Public Prosecutions

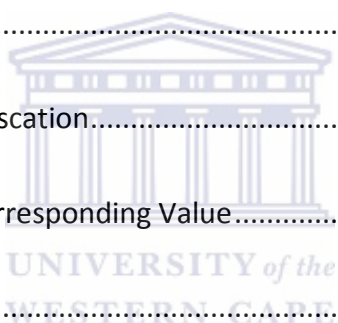


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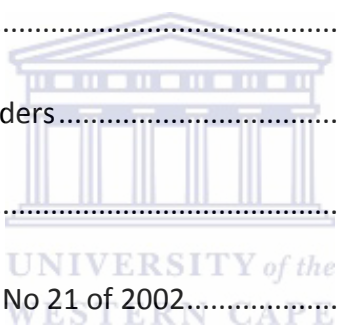
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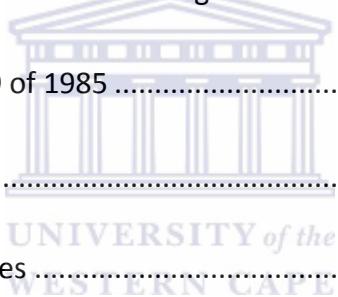
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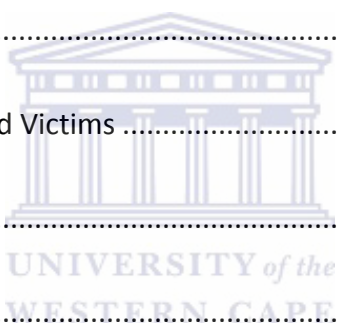


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Chapter One

General Introduction and Overview of the Study

1.1 Introduction

Asset recovery is considered globally a most effective way of combating economic crime.¹ Its main purpose is to deprive criminals of illicit assets. Thus, asset recovery is necessary where there are ill-gotten assets generated from crimes.

This chapter explores the magnitude of corruption as a crime which generates a huge amount of illegal proceeds across the world, on the one hand, and the role of asset recovery in curbing the problem, on the other hand.

1.2 Spread of Grand Corruption

In recent years, corruption and other economic crimes have become a universally endemic disease that poses a great threat to the economic stability and well-being of the world.²

Corruption has existed in societies for many years. However, grand corruption on an international scale became widespread in the early 1990s.³ The rapid growth of grand corruption was caused by trade liberalisation and free market policies which allowed multinational corporations from developed countries to become commercial competitors in the developing countries.⁴

The emergence of multinational corporations as powerful and influential economic entities, markets and movement, and advancement in electronic banking together contributed greatly to the growth of international corruption, as bribery is used commonly by

1 Muzila *et al* (2013: xxiii).

2 Ampratwum (2008: 77), Babu (2006: 1), Vlassis & Gottwald (2008: 368) and Carr (2007: 248).

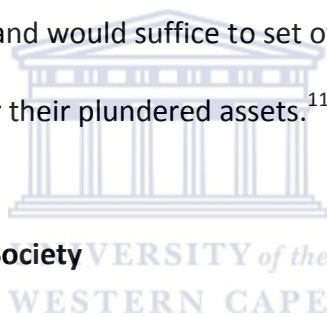
3 Ampratwum (2008: 81) and Babu (2006: 3).

4 Babu (2006: 3).

multinational companies to secure market share.⁵ Further, electronic banking allows for the transfer of huge amounts of money across borders within the shortest time.⁶

In addition, lack of transparency and accountability in public transactions, such as public procurements, became a loophole for public officials and political figures to receive bribes.⁷

It is reported that of \$4 trillion which is spent on government procurements annually all over the world, \$400 billion usually is siphoned off by corruption.⁸ Moreover, it is worth noting that developing countries, in particular African countries, are more affected by corruption than others.⁹ It is estimated that \$148 billion is looted from Africa annually and held in foreign financial institutions.¹⁰ This amount is equivalent to 25 percent of the gross domestic product of all of Africa and would suffice to set off the entire continental debt if African countries were to recover their plundered assets.¹¹



1.3 Effects of Corruption on Society

Today, all countries across the world are prone to corruption, regardless their political, economic, social or ideological background.¹² Further, it is present in and affects both the private and public sectors.¹³

Corruption causes poverty and undermines democratic values and the rule of law. In addition, it undermines global efforts to combat other crimes such as terrorism, drug trafficking and money laundering because it weakens enforcement agencies by

5 Carr (2007: 243).

6 Bacarese (2009: 421) and OECD (2008: 123).

7 Babu (2006: 3).

8 OECD (2008: 121) and Bacarese (2009: 422).

9 Babu (2006: 22 & 31) and Ampratwum (2008: 77).

10 Olaniyan (2004: 74).

11 Conference of the States Parties to UNCAC (6/7/2007: 1) and OECD (2008: 121).

12 Carr (2007:229).

13 OECD (2012:11).

compromising public officials. Further, corruption denies people basic services such as health and education because funds are diverted to criminals' pockets. Corruption also discourages foreign investment as it distorts fair competition in the tendering process, and leads to poor public performance through the recruitment of incompetent personnel in public institutions.¹⁴

Corruption, therefore, affects not only social and economic lives but also puts the world's security in peril.¹⁵

1.4 The Incidence of Corruption and Illicit Assets in Tanzania

Corruption is rampant in Tanzania. It is one of the major obstacles to the economic growth and sustainability of the country.¹⁶ The country loses a huge amount of money through corrupt practices. It is estimated that 20% of the national budget is lost to corruption annually.¹⁷

In recent years, Tanzania experienced grand corruption scandals which involved senior public officials and high political leaders.

Between 2005 and 2006, 22 companies stole 133 billion Tanzanian Shillings, the equivalent of \$96 million, from the External Payment Arrears Account facility at the Central Bank of Tanzania.¹⁸ The discovery of this theft led to the investigation and prosecution of a number of perpetrators, including big businessmen and senior officers of the Central Bank of Tanzania. However, hitherto no assets have been traced and recovered from the offenders,

14 Claman (2008: 335), Babu (2006:1), Foreword to UNODC Compendium of International Legal Instruments on Corruption and Preamble to UNCAC.

15 Claman (2008: 335).

16 Transparency International (2014: 3).

17 Transparency International (2014: 2) and Joint Evaluation of Support to Anti-Corruption Efforts (2011: 13).

18 Joint Evaluation of Support to Anti-Corruption Efforts (2011: 13).

save a handful of money which was paid back by a few perpetrators on condition that they would not be prosecuted.

Furthermore, in 2008 a government minister by the name of Andrew Chenge was forced to resign after he allegedly was implicated in taking a bribe of \$1 million from the British company, BAE Systems, in relation to a \$40 million radar deal.¹⁹ Sources disclosed that Chenge deposited the alleged bribe money in one of his offshore accounts, but this money has not been recovered by the state.

In response to the corruption problem, Tanzania enacted various anti-corruption laws. These laws include the Anti-Money Laundering Act (2006), the Prevention and Combating of Corruption Act (2007), the Proceeds of Crime Act (1991) and the National Prosecutions Service Act (2007). These laws contain provisions for the confiscation of proceeds of crime as one means of combating economic crimes. However, grand corruption persists in the country and only a few stolen assets have been confiscated to date. It is on this account that this study is exploring confiscation procedures in Tanzania.

1.5 Asset Recovery

Recently, recovery of proceeds of crime has moved rapidly to the top of the international agenda in fighting economic crimes.²⁰ Conventional measures, such as incarceration, were found to be inadequate to deter corruption perpetrators.²¹ Criminals not only continued to enjoy the fruits of their crimes but also used the same funds to finance other crimes.²²

Consequently, the international community has turned to asset recovery as a key element in

19 Joint Evaluation of Support to Anti-Corruption Efforts (2011: 13).

20 Babu (2006: 21), Conference of the States Parties to UNCAC (6/7/2007) 1and OECD (2012: 3).

21 Leach & Malcolm (1994: 293) and Claman (2008: 333).

22 Leach & Malcolm (1994: 293).

fighting economic crimes.²³ It is reported that while negotiating UNCAC, the UN General Assembly unanimously agreed that any meaningful solution to the problem of corruption must account for the recovery of proceeds derived from corruption.²⁴ The hope was that by attacking the economic base of criminality, the world would be able to eradicate economic crimes.²⁵

Significantly, UNCAC devotes the whole of Chapter V to asset recovery. Moreover, it prioritises asset recovery by referring to it as a fundamental principle.²⁶

1.6 Role of Asset Recovery in Combating Corruption

An effective confiscation regime plays a significant role in combating economic crimes. It prevents crimes through attacking criminals' economic base, hence denying them the financial capacity to fund other crimes. In addition, it deters present and future criminals by removing incentives for crime, thus sending a strong message that crime does not pay, and redresses the unjust enrichment of those who profit at society's expense.²⁷

Further, asset recovery compensates victims for their stolen property, reimburses the state its costs incurred in fighting corruption thereby allowing it to strengthen enforcement agencies, and engenders public confidence in the government by demonstrating that nobody is left to enjoy illicit enrichment.²⁸ By implementing asset recovery provisions, not

23 OECD (2012: 3).

24 Vlastic & Noell (2010: 106).

25 Leach & Malcolm (1994: 243).

26 Article 51 of UNCAC and Claman (2008: 336).

27 Bell (1998: 40) and Koren (2013: 10).

28 Bell (1998: 40), McCaw (2011: 196), Koren (2013: 10) and UNICRI 1-4.

only would the world reduce economic crimes but also countries would be able to recover stolen assets and use them for development projects.²⁹

1.7 Challenges to Asset Recovery

Despite many efforts, both at national and international levels, there has been little success in recovering proceeds of crime.³⁰ There remains a huge gap between assets which are stolen and recovered.³¹ Over the past 15 years, only \$5 billion have been repatriated to the victim countries.³² It was reported to the Conference of the States Parties to UNCAC that of all the chapters of the convention, Chapter V has been most difficult to implement.³³

The obstacles to effective asset recovery include arduous and lengthy procedures,³⁴ lack of political will in the victim state, lack of an appropriate and solid legal framework, lack of specialised technical expertise, lack of judicial pronouncements in the field of asset recovery and absence of strong institutions to enforce the provisions of asset recovery.³⁵ This study focuses on the first of this catalogue of obstacles. CAPE

1.8 Onerous and Lengthy Procedures as an Obstacle to Asset Recovery

Complicated procedures are reported by practitioners to be a roadblock to asset recovery.³⁶ Stringent procedures tend to delay and frustrate the process, thus providing opportunity for criminals to hide the assets and thereby defeat the objective of asset recovery.³⁷ These complexities include the requirement of a high standard of proof to link the criminal asset to

29 Conference of the States Parties to UNCAC (6/7/2007: 1).

30 Babu (2006:21) and Carr (2007: 230).

31 StAR Initiative (2011: 25) and Bacarese (2009:433).

32 Stephenson *et al* (2011: 25).

33 Conference of the States Parties to UNCAC (6/8/2008: 11).

34 Stephenson *et al* (2011: 60).

35 OECD (2008: 121), Vlassis & Gottwald (2008:364), Babu (2006:3), Brun *et al* (2011: 26) and StAR Initiative (2007: 27).

36 Brun *et al* (2011: 26) and StAR Initiative (2007: 27).

37 Stephenson *et al* (2011: 56).

offence, the requirement of dual criminality in cases of mutual legal assistance, the absence of civil forfeiture provisions and the requirement of notice to the defendant before a preservation order is granted.³⁸ Others are the statute of limitations, legal immunities,³⁹ the limited definition of predicate offences, and the requirement of a criminal charge preceding preservation orders. Also, bank secrecy laws and delays in adjudicating confiscation cases impede the recovery of proceeds.

It is common cause that in order to promote effective confiscation, the applicable procedures must be simple and short. Furthermore, due to the transnational nature of corruption crimes, asset recovery needs legal and procedural safeguards to be reconciled across borders in order to deny criminals safe haven.

As noted above, one of the major challenges in implementing asset recovery is the lack of appropriate procedures within individual states.⁴⁰ The existing legal frameworks in many of the States Parties to UNCAC do not provide a sufficiently practical basis for effective recovery of assets.⁴¹

Vlassis suggests that the first step in implementing chapter V of UNCAC should be the passage of legislation, in particular criminal procedure codes and banking regulations, because whatever efforts a country employs to co-operate with another country must be regulated by domestic laws.⁴² Moreover, it has been reported that arduous procedures established in domestic laws have resulted in failure of asset recovery across the world.⁴³

38 Brun *et al* (2011: 26).

39 Claman (2008: 347).

40 Bacarese (2009: 3).

41 OECD (2008: 123).

42 Vlassis & Gottwald (2008: 355) and Babu (2006: 23).

43 Brun *et al* (2011: 26), StAR Initiative (2007: 27) and Stephenson *et al* (2011: 56).

Thus, the provisions of UNCAC would be implemented fully only if there are good procedural rules in the domestic law of States Parties. Bad procedures may lead to a complete failure of a confiscation regime. In Tanzania, onerous procedures stand as an obstacle to asset recovery making an impact on corruption criminals.

It is against this backdrop that this study seeks to assess critically Tanzania's procedural laws with the view to evaluating the extent to which they are favourable to asset recovery. The aim is to provide a national roadmap for best procedures for recovering stolen assets.

1.9 Outline of the Remaining Chapters

Chapter two discusses the law of asset recovery at international level. It involves analysis of regional and international legal instruments, and various guides issued by international bodies in respect of asset recovery, particularly their procedural aspects. The essence of this chapter is to look at the best procedures for recovering assets recommended by the international community.

Chapter three deals with Tanzania's asset recovery legal framework. The chapter involves critical analysis of all laws governing asset recovery in Tanzania. This is the central part of the study as it seeks to assess how far the procedural rules in Tanzania allow effective recovery of proceeds. The chapter looks at all four basic stages of asset recovery, namely, tracing and identification, preservation, confiscation or forfeiture, and disposal of the confiscated property.

Chapter four deals with improving Tanzania's asset recovery legal framework. It highlights the strengths and flaws in the current legal framework. The essence of the chapter is to

identify and demonstrate areas in current confiscation procedures which impede smooth implementation of asset recovery.

Chapter five contains an assessment of the observations and findings made throughout the research. Further, it contains recommendations on best confiscation procedures for Tanzania.



Chapter Two

International Procedural Best Practice for Recovering Assets

2.1 Introduction

Asset recovery is a tedious and complicated process.¹ It includes tracing, identification, preservation, confiscation and repatriation of assets. The success of asset recovery, both at domestic and international level, depends crucially on good procedural laws. Today, illicit assets continue to pose threats to economy and security across the world. They not only disturb legitimate trade but also finance other organised crimes such as terrorism, piracy and drug trafficking.² Various global and regional efforts to recover criminal assets have been put in place. However, looting and hiding of assets continue to increase³ while only a meagre volume of assets is recovered.⁴ Moreover, even for the few assets that are recovered, the process is very slow and takes too long. For example, it took about 20 years to repatriate the illicit assets of the former President of Philippines, Ferdinand Marcos.⁵ One of the reasons for this failure is reported to be formalistic requirements and burdensome procedures imposed by countries in their domestic laws.⁶

The international community, through various instruments, has endeavoured to address this flaw by calling upon States Parties to adopt appropriate measures in their legal systems that would enable confiscation of illicit assets without undue procedural hurdles. Though the instruments leave discretion to individual states to determine their appropriate measures,

1 Jimu (2013: 317).

2 Ribadu (2008: 30).

3 Pieth (2008: 5).

4 Zinkernagel *et al* (2013: XIX).

5 Jimu (2013: 322).

6 Pieth (2008: 389).

they mention certain specific procedural aspects which they recommend all States Parties adopt in to their domestic laws for the purposes of facilitating asset recovery.⁷

This chapter examines the provisions of various international and regional instruments relating to asset recovery with a focus on the best procedures for recovering assets. In addition, the chapter explores opinions of pre-eminent academics and practitioners in the area of asset recovery.

2.2 International Co-operation

International co-operation is a key tool for recovering illicit assets. Normally, money launderers prefer to hold their criminal assets in foreign commercial centres in order to avoid detection.⁸ This fact explains the need for joint global efforts in the war against illicit assets. Furthermore, the global efforts cannot bring successful results unless there is good co-operation among states. The recovery process still is very slow and hardly successful because of the bureaucracies impeding international co-operation.⁹

Many international and regional conventions stress the significance of promoting friendly and effective international co-operation as a key procedural element of effective asset recovery.¹⁰ The co-operation is required at all stages of recovery, namely, identification, preservation and confiscation. Asset recovery requires a multifaceted approach to international co-operation.¹¹

7 See Article 54 of UNCAC, Article 12(6) & (7) of UNCTOC, Article 13 of the AU Convention, Article 23(2) of the CoE Criminal Law Convention and Article 8(2) of the SADC Protocol.

8 Muzila *et al* (2013: 253).

9 Pieth (2008: 389).

10 Article 55 of UNCAC, Article 13 of UNCTOC, Article 19 of the AU Convention and Article 8(4) of the SADC Protocol.

11 Pieth (2008: 183).

2.2.1 International Asset Recovery Orders

In the process of recovering assets, the law enforcement agencies need to secure two important orders, namely, a preservation and a confiscation order.¹² A Preservation order aims to restrain a property pending a confiscation order. The rationale of preservation orders is to avoid dissipation of property liable to confiscation. Confiscation orders are final in the recovery process. They transfer ownership of confiscated property from the defendant to the state. In order to strengthen the fight against economic criminality, UNCAC requires States Parties to enact laws that enable their competent authorities to give effect to preservation and confiscation orders issued by a foreign court.¹³ In addition, states are required to allow their competent authorities to grant either preservation or confiscation orders based on the evidence (information) provided by the requesting states.¹⁴ The availability of direct and indirect ways of enforcing asset recovery orders¹⁵ broadens the scope of asset recovery and eases the burden on the victim state. It provides a victim state with an option of choosing an easy and best way of recovering assets in a foreign country. Consequently, criminals ought to find it hard to hide their assets in foreign countries.

2.2.2 Dual Criminality

Many countries still require dual criminality as a condition of mutual legal assistance.¹⁶ It is reported that this requirement constitutes a bottleneck to asset recovery¹⁷ as the criminals take advantage of it to find safe haven in jurisdictions where their acts are not criminalised.

The offence for which the principle of dual criminality creates a serious problem is illicit

12 Article 54(1) & (2) of UNCAC.

13 Article 54 (1) & (2) of UNCAC.

14 Article 13(1)(a) of UNCTOC and Articles 54 & 55(1)(a) & (b) of UNCAC.

15 The ability of a victim state to institute recovery proceedings in a foreign court by itself or through the assistance of the government of the requested state.

16 Hart (2008: 182).

17 Bertossa (2008: 24).

enrichment. This offence is very common in the developing countries but it is not punishable in most western countries where a lot of illicit assets are held.¹⁸ Besides, some countries still require a bilateral treaty as a condition for mutual legal assistance. These stringent conditions hamper the efforts to recover ill-gotten assets globally.¹⁹

In order to promote the implementation of asset recovery, international best practice requires that countries afford one another mutual legal assistance without undue requirements such as bilateral treaties, dual criminality and conviction records. Both UNCAC²⁰ and UNCTOC²¹ insist on the removal of bilateral agreements as a condition for mutual legal assistance. Further, they provide that where such treaties are needed, the conventions themselves should be taken as sufficient treaties.

2.2.3 Sharing of Confiscated Proceeds

This principle allows the requested country to obtain a certain amount of the funds from confiscated assets as part of the costs incurred while recovering the assets. It is considered an important element of promoting international co-operation in asset recovery. The rationale behind this principle is to motivate countries to render necessary assistance in the process of recovering assets. Article 14(3)(b) of UNCTOC, article 5(5)(a) of the Vienna Convention and article 57(4) of UNCAC encourage states to include provisions that allow for sharing of confiscated proceeds. Further, FATF Recommendation 38 and article 8(6) of the SADC Protocol also advocate this strategy.

18 Bertossa (2008: 24).

19 Pieth (2008: 12).

20 Article 55(6) of UNCAC.

21 Article 13(6) of UNCTOC.

2.3 Bank Secrecy Laws

Confiscation regimes cannot work successfully in jurisdictions where there are financial secrecy laws.²² Such secrecy laws tend to shield criminals and their assets from detection. It is very difficult for investigative organs to trace illicit assets where the information on such assets is protected by law. A good confiscation regime, therefore, should enable competent authorities to order disclosure of financial information and to seize any financial records.²³ In order to give effect to asset recovery, the international community requires countries to adopt laws that compel financial institutions to disclose financial information about their customers and enable their designated authorities to seize such information. Article 12(6) of UNCTOC, article 5(3) of the Vienna Convention and article 31(7) of UNCAC oblige State Parties to enact financial disclosure laws within their legal frameworks. Moreover, article 17 of the AU Convention, article 13(2) of the ECOWAS Protocol and article 8(2) of the SADC Protocol oblige member states to abolish bank secrecy laws in their jurisdictions. They emphasise that secrecy laws should not be used as a ground to deny the requesting country mutual assistance.

2.4 Non-Conviction Based Confiscation

Non-conviction based confiscation refers to confiscation of criminal assets without a corresponding criminal conviction.²⁴ It is also known as civil forfeiture. It is an action against the property and not the individual. It is the property itself which is deemed guilty. Non-conviction based forfeiture has proved to be effective in countries where it has been implemented.²⁵ Its importance to asset recovery lies in the fact that the prosecution of

22 Muzila *et al* (2013: 253).

23 Hart (2008: 170).

24 Hofmeyer (2008: 135).

25 Zinkernagel *et al* (2013: XXI).

corrupt leaders is very difficult in developing countries with ongoing conflicts. The requirement of a criminal conviction poses a great challenge to the efforts to recover illicit assets. For this reason, the international community recommends the introduction of civil forfeiture as one way to enhance implementation of asset recovery. Civil forfeiture serves to bridge barriers such as the statute of limitations and legal immunities. Furthermore, the standard of proof in civil forfeiture is proof on a balance of probability, and it is easier for the state to meet this standard than the criminal standard.²⁶ FATF Recommendation 4 calls upon countries to enact laws that allow confiscation of criminal assets without requiring criminal conviction. Furthermore, article 54(1)(c) of UNCAC encourages States Parties to introduce civil forfeiture as a way of facilitating asset recovery.

2.5 Forfeiture of Property of Corresponding Value

Forfeiture of property of corresponding value means the ability of state authorities to forfeit a criminal's property of equivalent value to the stolen assets. Sometimes, the intricate nature of money laundering makes it difficult for investigative organs to uncover the actual proceeds of crime or to make a direct link between a crime and assets.

The absence of provisions allowing for forfeiture of assets of corresponding value renders asset recovery nugatory, in particular where the criminal manages to hide the criminal assets but he owns other valuable properties. This hampers the recovery objective of ensuring that no criminal is left to enjoy criminal fruits. In Switzerland, repatriation of some assets was made impossible because forfeiture of assets of equivalent value was not allowed.²⁷ It is recommended that countries should adopt the principle of forfeiture of property of corresponding value in order to foster asset recovery. Article 31 of UNCAC

26 Hofmeyer (2008: 137).

27 Hart (2008: 178).

requires member states to enact laws that allow confiscation of property whose value corresponds to that of the stolen assets. Furthermore, article 8(1)(a) of the SADC Protocol obliges States Parties to adopt measures which promote confiscation of properties of corresponding value.

2.6 Ex parte Orders

Ex parte orders are intended to authorise competent bodies to issue preservation orders against criminal property without giving notice to the property owner. The owner is notified after the property has been frozen or seized. The essence of such orders is to avoid a criminal dissipating the property or destroying evidence. Nowadays a criminal may transfer a huge amount of money across the world in a fraction of a second. In order to prevent this, authorities must be able to act expeditiously. If the state organs cannot preserve quickly assets liable to confiscation, the whole meaning of asset recovery is defeated. In order to give effect to the implementation of asset recovery, it is necessary for countries to allow immediate preservation measures without undue technicalities, such as the requirement of giving notice to the defendant. According to Pieth, the fundamental success of asset recovery relies largely on the ability of the authorities to freeze funds immediately upon detection.²⁸ Since preservation measures are temporary, they cannot be said to prejudice fundamentally the property owner provided that there are procedures for challenging such orders.²⁹ A requirement of notice at the initial preservation stage hinders asset recovery as it gives the defendant an opportunity to conceal both assets and evidence.

28 Pieth (2008: 11).

29 Pieth (2008: 11).

2.7 Establishing Illicit Enrichment as an Offence

The offence of illicit enrichment sometimes is referred to as possession of unexplained wealth or possession of property disproportionate to known source of income.³⁰ It has been learnt that most governments which succeed dictatorial regimes find it difficult to link directly the enrichment of the former leaders with specific criminal acts.³¹ Such leaders tend to destroy all necessary evidence before they leave office. Also, relevant witnesses disappear as most of them are allies of the former regime.³² Under these circumstances, it is thought that the viable solution is to reduce the burden of proof by requiring the prosecution to prove only that the defendant's wealth is not proportionate to his lawful income. The defendant is then required to prove that he acquired the assets lawfully, short of which the state is warranted to confiscate them. It is reported that the introduction of illicit enrichment as an offence has played a significant role in asset recovery.³³ It has worked effectively in Hong Kong, Argentina and India.³⁴

Article 12(7) of UNCTOC, article 5(7) of the Vienna Convention, article 20 of UNCAC and article 8 of the AU Convention call upon member states to consider introducing, in their domestic legal systems, the offence of illicit enrichment as one way of bolstering the war against illegal assets. In addition, under FATF Recommendation 4, countries are encouraged to consider criminalisation of illicit wealth.

30 Muzila *et al* (2013: 274).

31 Bertossa (2008: 26).

32 Bertossa (2008: 26).

33 Zinkernagel *et al* (2013: XXI).

34 Muzila *et al* (2013: 225).

2.8 Ability to Void Prejudicial Actions

Asset recovery would be meaningless if criminals are able to circumvent preservation orders.³⁵ An effective confiscation regime must be able to void and criminalise any actions that seek to defeat the objective of asset recovery. It will be absurd if a confiscation order is secured but there is no asset to forfeit. Thus, FATF Recommendation 4 requires countries to enact laws that enable their competent authorities to void all actions which prejudice the country's ability to preserve and recover illicit assets. Also, authorities must be able to prosecute those individuals who seek to defeat confiscation orders deliberately.

2.9 Expeditious Preservation and Confiscation Measures

Expeditious measures are a centre-piece of asset recovery.³⁶ Some assets, such as money, can be moved very easily and quickly whereas other assets, such as motor vehicles, are liable to wear and tear. Thus, a good confiscation regime must enable its investigative and judicial organs to act proactively in order to preserve and confiscate not mere assets but valuable assets. In addition, authorities must be able to dispose of some assets which are likely to depreciate in value pending confiscation. Moreover, the authorities should be able to respond spontaneously to foreign information relating to asset recovery, even without requiring formal communication, when it is necessary to do so.³⁷

Also, judicial authorities must determine confiscation proceedings within a reasonable time, so that the victims may be compensated and given the chance to use their recovered assets to improve their lives. Prolonged confiscation proceedings usually cost governments

35 Pieth (2008: 11).

36 Wyss (2013: 107).

37 FATF Recommendation 38 and Article 56 of UNCAC.

economically and politically, as they incur substantial costs in conducting such proceedings and lose public confidence if it takes too long for people to witness the success of recovery.

2.10 Broadening the Definition of a Predicate Offence

Some countries still have a limited list of offences for which the provisions of asset recovery can be invoked.³⁸ This anomaly tends to limit the scope of asset recovery and therefore allows criminals leeway. A good confiscation regime must ensure that criminals do not find any means to enjoy their ill-gotten wealth. Therefore, it is recommended that countries adopt forfeiture laws that cover all offences which generate proceeds, meaning that every criminal asset must be liable to forfeiture.

2.11 Conclusion

Procedure is one of the key components of asset recovery. Good procedures are fundamental to a successful confiscation regime. By contrast, bad procedures can frustrate the process and lead to a total failure of asset recovery. Many countries still have onerous procedures in their domestic laws and this has contributed to a poor functioning of asset recovery across the world. There is no one-size-fits-all procedure. An effective confiscation regime needs a variety of simple procedures through which it can be implemented. Since asset forfeiture is an international concern, it is incumbent upon each country to adopt the best procedures in order to enhance the implementation of asset recovery.

38 Hofmeyer (2008: 144).

Chapter Three

Tanzania's Asset Recovery Legal Framework

3.1 Introduction

International legal instruments on asset recovery are not self-executing.¹ They need to be incorporated into domestic laws in order to have legal effect.² The importance of domestic legislation stems from the fact that illicit wealth is prevalent in all countries, and global efforts against it must include each state putting in place anti-illicit assets laws. Any state authority must have legal backup in its domestic law in order to co-operate with another country in matters relating to asset recovery, on the one hand. On the other hand, the requesting state must follow the domestic procedures of the requested state in order to obtain mutual legal assistance. Further, some countries still require dual criminality as a condition for mutual legal assistance.³

Therefore, domestic law occupies an important position in the success of global asset recovery. It is on this account that this chapter examines the domestic legal framework of Tanzania. The aim is to assess the extent to which the domestic procedural law favours asset recovery.

Asset recovery in Tanzania is regulated in a number of enactments. Many statutes make provision for recovery of criminal assets ancillary to other matters. There is only one piece of legislation which is dedicated to the recovery of criminal assets. This chapter analyses

1 Low (May 2006: 4).

2 Low (May 2006: 4).

3 Pieth (2008: 182).

critically each of these laws with a focus on the provisions regulating forfeiture of criminal assets.

3.2 Prevention and Combating of Corruption Act No 11 of 2007 (PCCA)

The PCCA makes provisions for forfeiture of properties obtained through the commission of corruption offences. It provides also for investigative and preservation measures in respect of a property liable to a forfeiture order.

3.2.1 Investigative Measures

The PCCA entrusts enough powers to investigative officers to identify and trace illicit properties. The Director General of the Anti-Corruption Bureau may authorise any officer to search a person or enter into any premises and conduct a search if such Director has reason to believe that a property corruptly acquired is concealed or deposited in a certain place.⁴ Therefore, when it comes to tracing of illicit property the law takes into account the need to take immediate action and allows search without a court order. This provision is an implementation of the international best practice which requires countries to enable their investigative bodies to identify and trace corruption proceeds without unnecessary hindrances.⁵ Further, the PCCA puts measures in place to safeguard such powers from abuse. Section 13 makes it a criminal offence for an officer to exercise these powers maliciously.

4 Section 12 of the PCCA.

5 Article 31(2) of UNCAC.

3.2.2 Preservation Measures

An effective confiscation regime must be able to preserve an illicit property immediately upon detection.⁶ Countries are encouraged to adopt legislative measures which establish a variety of preservation measures, such as criminal, civil and executive.⁷ The PCCA reflects this best practice as it makes provisions for two ways of preserving a criminal property, namely, judicial and administrative preservation. Where a person is charged or is about to be charged with a corruption offence, the Director of Public Prosecutions may apply to a court for a preservation order against any property owned by or held on behalf of the accused person.⁸ The law does not require the property in question to be proceeds of corruption. This means that a court has the power to issue a preservation order against any of the person's property of corresponding value. Furthermore, the law puts mechanisms in place to ensure that preservation orders are not rendered illusory. Any dealing with the property in contravention of the preservation order is null and void.⁹

As intimated, the PCCA provides for administrative preservation of property. Where the Attorney General believes reasonably that a person has acquired an asset illicitly, he may issue a notice to that person requiring him not to transfer or dispose of the asset specified in the notice.¹⁰ Also, such a notice may be issued against any other person to whom the property has been transferred. The notice remains in force for a period of six months and where criminal proceedings are commenced in respect of the property under preservation before expiry of the six months, the notice remains in force until the determination of the

6 Pieth (2008: 11).

7 Pieth (2008: 11).

8 Section 38(1) of the PCCA.

9 Section 38(7) of the PCCA.

10 Section 34(2) of the PCCA.

proceedings.¹¹ Any person who contravenes the directions contained in the notice commits an offence and upon conviction is liable to a fine not exceeding 10 million Tanzanian shillings or to a prison term not exceeding seven years or to both.¹² In the case of *Faraji Chambo*¹³ the court found the accused persons guilty of an offence of selling a property (a house) which was under administrative preservation. The conviction and sentence were upheld later by the High Court.¹⁴

3.2.3 Rights of Third Parties

Procedures for recovering corruption proceeds must not be enforced in such a way that prejudices *bona fide* third parties.¹⁵ The Constitution of the United Republic of Tanzania bestows on a person a right lawfully to own a property.¹⁶ The PCCA also safeguards the interests of innocent owners. In making a preservation order, the court may authorise payment of a debt incurred in good faith and which was due to creditors of the accused person before the Director of Public Prosecutions applied for the order.¹⁷ Further, the provision empowers the court to order sale or disposal of a property subject to preservation if the court is satisfied that such disposal is necessary to safeguard the property rights of a person. However, the provision does not provide expressly for procedures for a third party to join forfeiture proceedings or to challenge the decision.

11 Section 34(4) of the PCCA.

12 Section 34(5) of the PCCA.

13 Criminal Case No 82 of 2012.

14 Criminal Appeal No 54 of 2013.

15 Article 31(9) of UNCAC.

16 Article 24(1) of the Constitution.

17 Section 38(3) of the PCCA.

3.2.4 Forfeiture Orders

Section 40(2) of the PCCA authorises the Director of Public Prosecutions to apply for a forfeiture order against any property obtained from the commission of a corruption offence. Such a forfeiture order can be applied for after a person has been convicted of a corruption offence under the PCCA. The order can be issued only against proceeds of a corruption offence.¹⁸ Instrumentalities and properties of equivalent value to the benefits derived from corruption are not included under such forfeiture orders.¹⁹ This omission impairs the initiatives to broaden the scope of asset recovery and it goes against best practice.²⁰ Where the court issues a forfeiture order against a property, such property vests in the United Republic of Tanzania²¹ and it is registered in the name of Treasury Registrar on behalf of the United Republic of Tanzania.²²

The PCCA allows only conviction based forfeiture. A person must have been convicted of a corruption offence in order for the Director of Public Prosecutions to apply for a forfeiture order.²³ By not including civil forfeiture, the PCCA fails to take into account challenges facing corruption prosecutions against senior public officials, particularly in developing countries. The international community would like countries to include civil forfeiture in their domestic laws.²⁴

18 Section 40(3) of the PCCA.

19 Section 40(2) of the PCCA.

20 Article 31(1) of UNCAC.

21 Section 43(1) of the PCCA.

22 Section 43(3) of the PCCA.

23 Section 40(2) of the PCCA.

24 Article 54(1)(c) of UNCAC and FATF Recommendation 4.

3.2.5 Pecuniary Penalty Orders

A pecuniary penalty order is a court order that requires a convicted person to pay the state money of the equivalent value to the benefits he derived from the commission of an offence.²⁵ Usually, such an order is applied where the actual benefits so derived cannot be traced. Thus, the state seeks a pecuniary penalty order in lieu of the benefits. The PCCA makes provision for the Director of Public Prosecutions to apply to court for pecuniary penalty orders.²⁶ However, the provision falls short on detail. It is not clear under which circumstances the Director may apply for and obtain the orders. Furthermore, the provision is silent on the manner in which a pecuniary penalty order may be enforced.

3.2.6 Civil Remedies

Civil actions are considered a breakthrough in the fight against corruption and illicit assets.²⁷ They are intended to supplement criminal remedies in order to block all possibilities that a criminal might rely upon to enjoy criminal benefits. The PCCA provides civil remedies for a victim of corruption offence. Where an agent receives any advantage in contravention of the provisions of the PCCA, the principal may institute a civil suit to recover, as a civil debt, the money value from the agent.²⁸ However, this provision is restrictive as it allows only a principal to recover the money value of an advantage received illegally by his agent. It does not include other categories of victims of corruption.

3.3 Prevention of Terrorism Act No 21 of 2002 (PTA)

The PTA criminalises acts of terrorism and financing of terrorism. In addition, it makes provisions for preservation and forfeiture of properties connected to terrorist acts.

25 CDPP Instructions (June 2013: 3).

26 Section 41(2) of the PCCA.

27 Article 53(a) of UNCAC.

28 Section 44(1) of the PCCA.

Properties liable to forfeiture include proceeds,²⁹ instrumentalities³⁰ and any other property owned or controlled by or on behalf of a terrorist group.³¹

3.3.1 Preservation Measures

The PTA empowers a court to issue a seizure or restraint order against any property which is liable to forfeiture.³² The court can issue such orders on *ex parte* application if it is satisfied, on reasonable grounds, that the property is an instrumentality or proceeds of crime.³³ In addition, the court may appoint a person to take control of the property. The person so appointed can do to the property as the court may direct him, including selling it pending forfeiture in case it is of a perishable nature. The PTA is silent on the qualifications of the person to be appointed to take care of the property.

3.3.2 Conviction Based Forfeiture

The PTA requires a criminal conviction before a forfeiture order may be issued. Where a person is convicted of an offence under the PTA, a court may order any property that was used for or in connection with the commission of an offence to be forfeited to the government.³⁴ Also, the court may order forfeiture of any property that was received as payment or reward for the commission of a terrorist act.³⁵ Section 36 of the PTA allows for forfeiture of both instrumentalities and proceeds of crime. Forfeiture under this section must be preceded also by a conviction for an offence under the Act.

29 Section 36(1)(a) of the PTA.
30 Section 36(1)(b) of the PTA
31 Section 43(1) of the PTA.
32 Section 43 of the PTA.
33 Section 42(1) of the PTA.
34 Section 36(1) of the PTA.
35 Section 36(1)(b) of the PTA.

3.3.3 Non-Conviction Based Forfeiture (Civil Forfeiture)

Section 43(1) of the PTA introduces civil forfeiture. The Attorney General may apply to court for a forfeiture order against any property that is owned or controlled by or on behalf of a terrorist group. The order may cover any property that has been used or is being used or is about to be used in the commission or facilitation of the commission of a terrorist offence. The court may issue a forfeiture order if it is satisfied, on a balance of probability, that the property was used or was about to be used in the commission of an offence. This section does not require a conviction as a pre-condition of forfeiture. Further, the standard of proof is proof on a balance of possibility. Basically, section 43(1) is intended to include a situation where a terrorist act has not been committed yet but the properties might be used in the commission or facilitation of terrorism in future. It is therefore a proactive provision which aims to prevent rather than cure.



3.3.4 Rights of Third Parties

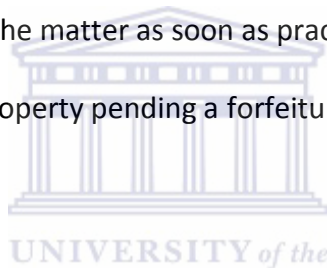
Section 36(2) of the PTA provides safeguards for an innocent owner of a property subject to a forfeiture order. The court is required to give an opportunity to be heard to any person who appears to have an interest in the property. The court is obliged to exclude the interests of a person in a property from being forfeited if it is satisfied that the person exercised reasonable care to ensure that the property would not be used to commit a terrorist act. Furthermore, the court must be satisfied that the person claiming interests in the property is not a member of a terrorist group.

3.4 Wildlife Act No 5 of 2009

This Act makes provisions specifically for the conservation and protection of wildlife. It criminalises acts that violate protection of wildlife and it provides measures for forfeiture of properties involved in the commission of offences against wildlife.

3.4.1 Preservation Measures

The Wildlife Act empowers an enforcement officer to preserve a property liable to forfeiture. Such an officer may seize any proceeds or instrumentalities if he believes, on reasonable grounds, that a person has committed or is about to commit an offence.³⁶ The seizure is administrative because it does not require a court order, but once an officer has seized a property he must remit the matter as soon as practicable to a court in order to determine the custody of such property pending a forfeiture order.³⁷



3.4.2 Forfeiture Orders

The Wildlife Act makes provision for forfeiture of proceeds and instrumentalities.³⁸

Forfeiture under this Act can be carried out only if a person is convicted of a wildlife offence under the Act.³⁹ The proceeds which can be forfeited under section 111(1)(a) are limited to an animal, livestock or trophy in respect of which the crime is committed. This means, by implication, that the court cannot order forfeiture of other forms of proceeds, such as money or buildings. This forfeiture provision is narrow in scope and it hampers the efforts to

36 Section 106(1)(c) of the Wildlife Act.

37 Section 106(3) of the Wildlife Act.

38 Section 111(1)(a) & (b) of the Wildlife Act.

39 Section 111(1) of the Wildlife Act.

denude criminals of all illicit wealth. A property that is forfeited to the government is vested in the Director of Wildlife.⁴⁰

3.4.3 Rights of Third Parties

The court which issues a forfeiture order under the Wildlife Act is required to take into account the rights of innocent owners. The court should not make a forfeiture order against a property if it is satisfied that the owner did not know or could not have known reasonably that the property was intended to be used by the accused in the commission of an offence.⁴¹ However, the Act does not provide expressly for procedures for the owner to join forfeiture proceedings.

3.5 Fisheries Act No 22 of 2003

This Act makes provision for the conservation and sustainable development of aquaculture and the control of fish and related matters. It also criminalises acts which violate conservation rules and puts measures in place to forfeit properties linked to offences committed under the Act.

3.5.1 Preservation Measures

The Fisheries Act empowers designated officers to preserve properties liable to confiscation. Under section 36, an authorised officer may enter into any premises, and seize and retain anything which he thinks reasonably is related to an offence under the Act.⁴² The officer may exercise his powers to seize and retain a property under section 36 with or without a warrant. The provision empowers the officer to seize and retain any article or property which is related to the commission of an offence, meaning that both proceeds and

40 Section 111(3) of the Wildlife Act.

41 Section 111(2) of the Wildlife Act.

42 Section 36 of the Fisheries Act.

instrumentalities may be seized and retained. If a seized article is of a perishable nature, the authorised officer may dispose of it pending forfeiture.⁴³

3.5.2 Forfeiture Orders

The Fisheries Act makes provisions for two types of forfeiture, namely, civil and conviction based forfeiture. Civil forfeiture is applicable only where a property liable to forfeiture is fish, fish product or aquatic flora.⁴⁴ A court may order forfeiture of such items regardless of whether a person has been convicted of an offence.⁴⁵ Also, the Act provides for conviction based forfeiture with respect to instrumentalities. A court may order forfeiture of a vessel or vehicle if it is satisfied that such a vessel or vehicle was used in the commission of an offence.⁴⁶ Forfeiture of instrumentalities can be done after a person has been convicted of an offence.⁴⁷



3.5.3 Rights of Third Parties

The Act takes care of the rights of the innocent owner of a property subject to forfeiture. Where the owner of property satisfies the court that he had no knowledge that his vessel or vehicle was intended to be used in the commission of an offence, the court shall not order forfeiture of such a property.⁴⁸

43 Section 38(2) of the Fisheries Act.
44 Section 38(1) of the Fisheries Act.
45 Section 38(1) of the Fisheries Act.
46 Section 39 of the Fisheries Act.
47 Section 39 of the Fisheries Act.
48 Section 39(2) of the Fisheries Act.

3.6 Economic and Organised Crime Control Act No 13 of 1984 (EOCC Act)

The EOCC Act establishes a number of offences referred to as economic offences. Also, it provides measures for the preservation and forfeiture of properties related to the commission of offences under the Act.

3.6.1 Preservation Measures

The EOCC Act empowers a police officer to enter into premises, conduct a search and seize any property which he believes reasonably to have been used in the commission of an offence or will afford evidence as to the commission of an economic offence.⁴⁹ Such search and seizure must be authorised by a court, but a police officer may exercise his powers without a court order if he believes that any delay may result in the removal or destruction of a property. Where the search is carried out without a court order, the officer must report immediately to the court the results of such a search.⁵⁰ Since the property is seized for the purpose of being tendered in evidence as exhibit, the law requires the police officer to keep the seized property until it is tendered in evidence. Moreover, the law puts measures in place to prevent officers from abusing these powers. Whoever exercises such powers without reasonable cause commits an offence of abuse of office.⁵¹

3.6.2 Forfeiture Orders

The court is required to order forfeiture of a property if it is satisfied that such property was used in committing or facilitating the commission of an offence.⁵² A forfeiture order under this law can be issued only if a person is convicted of an economic offence. The EOCC Act suffers from a material weakness because it does not cover proceeds of crime, despite the

49 Section 22(1) of the EOCC Act.

50 Section 22(2) of the EOCC Act.

51 Section 22(5) of the EOCC Act.

52 Section 23(3) of the EOCC Act.

fact that many offences under the Act generate huge amounts of criminal proceeds.

Forfeiture under the Act is in respect of instrumentalities only.⁵³ Where the property is forfeited, the court is required to order disposal of such property and the proceeds should be paid into the Consolidated Fund.⁵⁴

3.7 Drugs and Prevention of Illicit Traffic in Drugs Act No 9 of 1995 (Drugs Act)

The Drugs Act establishes drugs related offences. Where a person is convicted of an offence under the Drugs Act, a court may order forfeiture of property owned by him on the date of conviction or acquired by him after that date.⁵⁵ It is a conviction based forfeiture because a criminal conviction is a pre-condition of forfeiture under this Act. The Act requires the property to be forfeited to the government in accordance with the provisions of the Proceeds of Crime Act.⁵⁶ The proceeds of the property forfeited under the Drugs Act should be deposited into the Fund for Control of Drug Abuse.⁵⁷

The provisions on forfeiture under the Drugs Act are vague. Section 46(1), which provides for forfeiture, does not specify the properties liable to forfeiture. It provides simply that any property owned by the convict on the date of conviction or acquired by him after that date is liable to forfeiture. The section is silent on forfeiture of proceeds and instrumentalities, especially where they are not owned by the convicted person. Such an absence may bring confusion to the implementation of the forfeiture provisions of the Act.

53 Section 23(3)(a) of the EOCC Act.

54 Section 23(8) of the EOCC Act.

55 Section 46(1) of the Drugs Act.

56 See 3.13 below.

57 Section 11(1)(a) of the Drugs Act.

3.8 Criminal Procedure Act No 9 of 1985 (CPA)

This piece of legislation is a primary law which governs criminal proceedings in the country. It applies to all offences save where a written law excludes expressly its application. The Act allows the court to issue a forfeiture order against a property that was used to commit or facilitate the commission of offence.⁵⁸ The relevant provision covers only forfeiture of instrumentalities. A forfeiture order can be issued after a person has been convicted of an offence. Unlike other enactments, a forfeiture order under the CPA may be issued in respect of any offence of which the person is convicted. Furthermore, a court may direct a forfeited property to be disposed of, and the proceeds thereof are to be paid into the Consolidated Fund.⁵⁹

3.9 Forest Act No 10 of 2002

The Forest Act establishes various offences relating to forestry. It also makes provision for law enforcement to seize and make forfeiture orders against properties which are linked to offences committed under the Act.

3.9.1 Preservation Measures

The Forest Act authorises a reserve manager or police officer to seize and retain any article in connection with an offence committed under the Act.⁶⁰ The officer may retain the property until an offence for which it was retained is prosecuted and determined or the decision not to prosecute is made.⁶¹ Furthermore, the provision empowers the reserve manager to sell or destroy the property under his custody if the property is of a perishable nature. The officer can exercise these powers without a court order.

58 Section 351(1) of the CPA.

59 Section 351(2) of the CPA.

60 Section 94(1)(2) of the Forest Act.

61 Section 94(2) of the Forest Act.

3.9.2 Forfeiture Orders

Where a person is convicted of an offence under the Forest Act, the court may order forfeiture of any forest produce in respect of which the offence was committed and any instrument used in the commission of such offence.⁶² A forfeiture order under this Act can be obtained after a person has been found guilty of an offence. Any property forfeited vests in the reserve manager.⁶³ The Act is silent with respect to the rights of the innocent owner.

3.10 Anti-Trafficking in Persons Act No 6 of 2008 (ATPA)

ATPA criminalises acts of trafficking in persons and related matters. Further, it makes special provisions for forfeiture of proceeds of and instruments used to commit crimes, and bestows powers upon authorities to issue pecuniary penalty orders.

3.10.1 Forfeiture Orders

The court may order forfeiture of proceeds derived from and instruments used in the commission of an offence.⁶⁴ The property is forfeited to the government but the law does not mention a specific officer or fund in which the forfeited property should vest. A forfeiture order can be issued after a person has been convicted of an offence under the Act. ATPA does not provide procedures for third parties to appear in court and claim their interests in the property. Moreover, the ATPA is silent on the procedures of identification and preservation of property liable to confiscation.

62 Section 97(2) of the Forest Act.

63 Section 97(1) of the Forest Act.

64 Section 14(1) of ATPA.

3.10.2 Pecuniary Penalty Orders

ATPA empowers the court to order an offender to pay money in lieu of the proceeds and instrumentalities.⁶⁵ The court can exercise such powers where the offender has concealed the properties liable to forfeiture or where the properties have diminished in value or have been destroyed by an act or omission of the offender for the purpose of preventing them from being found or forfeited. However, the Act does not provide procedures for the enforcement of such pecuniary penalty orders.

3.11 National Prosecutions Service Act No 27 of 2007 (NPSA)

The NPSA regulates the office of national prosecutions and powers of the Director of Public Prosecutions (DPP). The DPP is in charge overall of prosecutions in the country. All prosecution officers operate under powers delegated to them by the DPP. The DPP is empowered to take any appropriate measures to implement forfeiture provisions.⁶⁶ The Act gives the DPP general powers to enforce the recovery of criminal proceeds. It does not mention specifically any law under which the DPP should exercise this power. This implies that the DPP, being in charge overall of criminal prosecutions, may invoke provisions of any relevant law to enforce forfeiture with respect to any criminal offence.

3.12 Anti-Money Laundering Act No 12 of 2006 (AMLA)

AMLA makes provision for prevention and prohibition of money laundering. Further, all matters pertaining to the tracing, preservation and forfeiture of properties in relation to

65 Section 14(3) of ATPA.

66 Section 12 of the NPSA.

offences under AMLA should be pursued in accordance with the provisions of the Proceeds of Crime Act.⁶⁷

3.13 Proceeds of Crime Act No 25 of 1991 (POCA)

POCA is a premier enactment which governs recovery of criminal proceeds in the country. It is the sole enactment which is dedicated to asset recovery. It covers both substantive and procedural aspects of recovering proceeds located within and outside the country.

Furthermore, it sets standard of proof to be applied when its provisions are invoked.

3.13.1 Types of Offences Covered by POCA

It is best practice to have a wide scope of offences to which confiscation provisions can be applied.⁶⁸ POCA does establish a range of offences for which its provisions can be invoked.

However, it does not provide for recovery of the proceeds and instrumentalities of all offences. POCA applies only to serious offences.⁶⁹ The enforcement agencies can invoke the provisions of this law if a person is convicted of or is charged or about to be charged with a serious offence.

A serious offence means a money laundering offence and includes all predicate offences.⁷⁰

The definition of a predicate offence encompasses a long list of offences.⁷¹ In addition, the Minister, by a notice published in the Gazette, may declare any other offence a predicate offence.

67 Section 28 of AMLA and See 3.13 below.

68 Article 56 of UNCAC and FATF Recommendation 38.

69 Section 9 and section 38 of POCA.

70 Section 3 of POCA as amended by section 4 of Act No 15 of 2007.

71 Section 3 of AMLA.

3.13.2 Types of Property Liable to Forfeiture under POCA

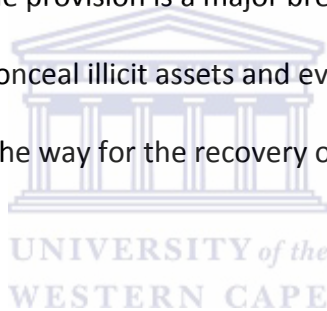
Any tainted property in relation to a serious offence is liable to forfeiture.⁷² A tainted property means any property that has been used in or in connection with the commission of a serious offence or that constitutes proceeds of a serious offence.⁷³ Thus, POCA covers both types of property, namely, proceeds and instrumentalities. In addition, a court may issue a restraint order against any other valuable property owned by the offender or under his effective control.⁷⁴ Such a property may be restrained where the offender derived benefits from the commission of a serious offence but the actual proceeds (benefits) cannot be traced. Under such circumstances, the court may restrain a property for the purposes of satisfying an ensuing pecuniary penalty order.⁷⁵

3.13.3 Investigative Powers

POCA gives investigative powers to law enforcement agencies to identify and trace a property which is liable to confiscation. A police officer may search a person or enter into any premises and conduct a search if he believes, on reasonable grounds, that there is a tainted property on such premises.⁷⁶ The police officer must seek and obtain a court order before he mounts a search.⁷⁷ However, he may conduct a search and seize a tainted property without a court order where he has reasons to believe that it is necessary to do so in order to prevent concealment or destruction of the tainted property, or circumstances require immediate intervention.⁷⁸

72 Section 9(a) of POCA.
73 Section 3 of POCA.
74 Section 38(1) and section 39(5) of POCA.
75 Section 23(3) of POCA.
76 Section 31 of POCA.
77 Section 32 of POCA.
78 Section 34 of POCA.

Further, a police officer is mandated to enter into and search any premises where he suspects reasonably that there is a property-tracking document⁷⁹ in relation to a serious offence.⁸⁰ The officer must be authorised by the court in order to conduct such a search. In addition, where an investigator has reasonable grounds to suspect that a person has in his possession a property-tracking document, he may apply for and obtain a production order from the court directing the person to produce to the investigator a document described in the order.⁸¹ A person against whom a production order is issued cannot refuse to produce a document on the ground that its production might tend to incriminate him or make him liable to a penalty.⁸² Further, he cannot claim an obligation or privilege of non-disclosure as an excuse for not producing it. The provision is a major breakthrough in asset recovery as it denies criminals opportunity to conceal illicit assets and evidence on the basis of confidentiality, thereby clearing the way for the recovery of illegal assets.



3.13.4 Bank Secrecy

Bank secrecy laws constitute a critical impediment to the recovery of illicit assets.⁸³ States are encouraged to enact financial disclosure laws in order to bolster anti-illicit asset efforts.⁸⁴ The problem is countered adequately under POCA. No financial institution can refuse to provide information relating to a tainted property on the grounds of confidentiality. Where the Inspector General of Police (IGP) suspects that evidence in relation to a tainted property is likely to be found in a bank account,⁸⁵ he may authorise a

79 According to section 3 of POCA, a property-tracking document means any document relevant to identifying, locating and quantifying a tainted property or any property of an offender.

80 Section 63(1) of POCA.

81 Section 58(1) of POCA.

82 Section 58(8) of POCA.

83 Muzila *et al* (2013: 253).

84 Article 31(7) of UNCAC, Article 17 of the AU Convention and Article 12(6) of UNCTOC.

85 According to section 63A(4) of POCA, a bank account includes any ledger, log book, cash book or any other document used in the ordinary course of business by a person carrying on any banking business.

police officer to investigate such a bank account.⁸⁶ Such authorisation is sufficient to warrant production of the bank account for scrutiny by the police officer. The police officer may seize a document or take copies of any relevant entries from that account. The law compels a bank officer to co-operate with the investigator. A person who fails to produce a bank account when required to do so by a police officer commits an offence punishable by a prison term not exceeding two years or a fine of not less than one million shillings or both.⁸⁷

Moreover, the court, upon application by the Director of Public Prosecutions, may issue a monitoring order directing a financial institution to give information to the IGP about financial transactions conducted through an account for the period specified in the order.⁸⁸

A financial institution against which such an order is issued is obliged to provide correct information. The Act criminalises the giving false or misleading information.⁸⁹

3.13.5 Preservation Measures

Preservation under POCA is referred to as restraint, freezing or interdict.⁹⁰ The Act makes provision for preservation of a property liable to a forfeiture order. The preservation under POCA is judicial, in the sense that a preservation order must be issued by a court upon an application by the Attorney General.⁹¹ However, in some exceptional circumstances administrative preservation is allowed for a limited period.⁹² A restraint order may be issued against any tainted property, whether owned by the defendant or another person. In addition, the court may issue a restraint order against property other than tainted property

86 Section 63A(1) OF POCA.

87 Section 63A(3) of POCA.

88 Section 65(1) of POCA.

89 Section 65(5) of POCA.

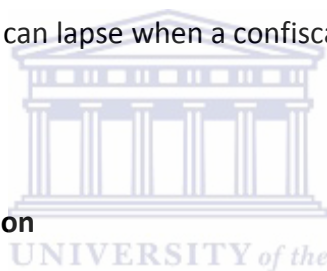
90 Section 31A and section 38 of POCA.

91 Section 38 of POCA.

92 Section 31A of POCA.

if such property is owned by the defendant or is under the effective control of the defendant.⁹³ The court may issue a restraint order against a licit property of the defendant if such defendant derived benefits from the commission of a serious offence and the actual benefits cannot be found.⁹⁴ Therefore, a preservation order may be issued against the instrumentalities and proceeds of a serious offence or any valuable property of the defendant if he derived benefits from the commission of such offence and such benefits cannot be traced.

The preservation order issued by a court remains in force until the criminal charge against the person in respect of whom the order was issued is withdrawn or such person is acquitted of the charge.⁹⁵ Also, it can lapse when a confiscation order or a pecuniary penalty order is satisfied.⁹⁶



3.13.6 Administrative Preservation

Administrative preservation refers to preservation measures which do not require an authorisation of a court. The law allows investigative bodies to preserve a certain type of property for a particular time. The Inspector General of Police or the Director of Criminal Investigation may authorise a police officer to freeze a bank account and seize any document if he believes, on reasonable grounds, that a person has committed a serious offence.⁹⁷ Such freezing order remains in force for seven days only. A police officer must obtain a court order if he wants to extend the time of operation of such freezing order.⁹⁸ A police officer may freeze any account of a suspect, his spouse, child or any person

93 Section 39(6)(ii) of POCA.

94 Section 25(3) and section 39(6)(ii) of POCA.

95 Section 52(1) of POCA.

96 Section 52(2) of POCA.

97 Section 31A of POCA.

98 Section 63A(2) of POCA.

reasonably believed to be his trustee or agent.⁹⁹ Such a provision responds to the international obligation which requires states to confer wide investigative powers on their competent authorities in order to facilitate the tracing and recovery of criminal assets.¹⁰⁰

3.13.7 *Ex parte* Applications

Generally, preservation applications under POCA are *inter partes*. The Attorney General, as applicant, is required to give written notice of a preservation application to the owner of the property and any other person whom he believes reasonably may have an interest in the property to be preserved.¹⁰¹

However, in certain special cases the Attorney General may obtain an *ex parte* order against a property. The court may grant an *ex parte* order if it is satisfied that there are circumstances of urgency that compel disposing with a notice to the adverse party or if it would be contrary to the public interest to give such notice.¹⁰² An *ex parte* order can remain in force for a period not exceeding fourteen days.¹⁰³ The court, upon application by the Attorney General before expiry of the *ex parte* order, may extend the time of operation of the order if it is satisfied that there are justifiable grounds.¹⁰⁴ On this aspect, POCA fails to comply fully with best practice which requires all provisional applications to be made *ex parte*.¹⁰⁵

99 Section 63A(1) of POCA.

100 FATF Recommendation 31 .

101 Section 40(a) & (b) of POCA.

102 Section 40(2) of POCA.

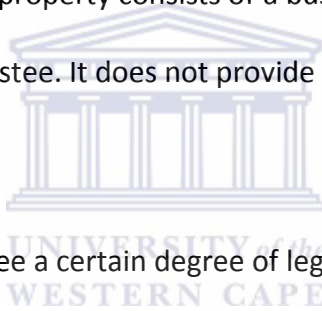
103 Section 40(2) of POCA.

104 Section 40(3) of POCA.

105 Pieth (2008: 11).

3.13.8 Custody of Property under a Preservation Order

The court has discretion to who should take custody a restrained property. No specific officer or institution is designated by POCA to take care of a restrained property. The court may direct a property or part of the property to be taken into the custody and control of a trustee.¹⁰⁶ This means, by implication, that a court may elect to put a property into the custody of a person other than a trustee. The court may appoint a trustee if it is satisfied that there are compelling circumstances to do so. An appointed trustee may do anything which is reasonably necessary to preserve the property, including becoming a party to any civil proceedings affecting the property.¹⁰⁷ Also, he may employ and terminate the employment of any person if the property consists of a business. However, the law is silent on the qualifications of such a trustee. It does not provide how and where a trustee should be recruited.



Further, POCA guarantees a trustee a certain degree of legal protection. Thus, a trustee cannot be liable for any loss of or damage to the property, unless such loss or damage was caused by his negligence.¹⁰⁸ Also, he cannot be held liable to pay costs of proceedings instituted to claim an interest in the property.

3.13.9 Effects of Contravening a Preservation Order

POCA contains provisions to safeguard a property which is under a preservation order. It criminalises any act which seeks to defeat a restraint order. A person who disposes of, or otherwise deals with a restrained property, commits an offence punishable by a fine not exceeding five hundred thousand shillings or the value of property, whichever is the

106 Section 38(2)(b) of POCA.

107 Section 38(5) of POCA.

108 Section 49 (1) of POCA.

greater.¹⁰⁹ Alternatively, such a person may be liable to imprisonment for a term not exceeding fifteen years or to both a fine and imprisonment. Where a contravention is committed by a body corporate, such body corporate is liable to a fine not exceeding five million shillings or three times the value of the property, whichever is the greater.¹¹⁰ In addition, a court may nullify any dealing with a preserved property in contravention of a restraint order.¹¹¹ The provision on invalidation of illegal dealing with a property under preservation conforms to the FATF Recommendations.¹¹²

3.13.10 Standard of Proof in Preservation Applications

POCA establishes different standards of proof for different applications. It imposes a lesser standard of proof for a preservation application than the normal standard of proof required in criminal proceedings. The standard of proof required is proof on reasonable grounds.¹¹³ Proof on reasonable grounds is a lower standard even than a proof on a balance of probability. Such a lower standard of proof is in favour of asset recovery as it enables enforcement agencies to preserve a property at the initial stage of investigation. It is a standard of proof which is in consonance with the objective of preservation measures because assets must be preserved at a very early stage, while the investigation yet is to gather sufficient evidence for forfeiture.

3.13.11 Rights of Third Parties at the Preservation Stage

POCA recognises the rights of a person, other than a defendant, who may have an interest in a property subject to a preservation order. Under section 40, the Attorney General is

109 Section 47(a) of POCA.

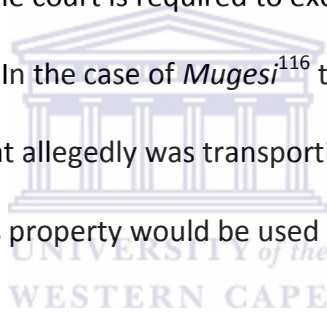
110 Section 47(b) of POCA.

111 Section 47(2) of POCA.

112 FATF Recommendation 4.

113 Sections 39(3)(b), (6)(b) & (5)(b) of POCA.

required to give written notice of a restraint application to any person whom he reasonably believes to have an interest in the property. A person with an interest in a property subject to a restraint order may apply to court for variation of the order to exclude his interest from its operation.¹¹⁴ The court is required to exclude such person's interest if the claimant proves that a preserved property is not a tainted property or he acquired it for sufficient value, without knowledge, and in circumstances such as not to arouse reasonable suspicion that the property was a tainted property.¹¹⁵ If the person can prove either of these two conditions, the court must exclude his interest in the property from the operation of preservation order. The provision uses the mandatory formulation 'the court shall grant such application', meaning that the court is required to exclude a person's interest when he meets the prescribed conditions. In the case of *Muges*¹¹⁶ the court declined to issue a restraint order against a truck that allegedly was transporting drugs, on the grounds that the owner had no knowledge that his property would be used in the commission of an offence.



3.13.12 Conviction Based Forfeiture

Generally, forfeiture under POCA is conviction based. The Act makes a conviction for a serious offence a pre-condition for forfeiture. The Attorney General may apply to court for a forfeiture order only when a person has been convicted of a serious offence.¹¹⁷ Upon such application the court may grant a forfeiture order if it is satisfied that a property is the tainted property.¹¹⁸

114 Section 43(3) of POCA.

115 Section 43(3)(a) & (b) of POCA.

116 Criminal Appeal No 22 of 2011.

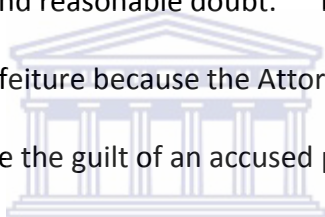
117 Section 9(1) of POCA.

118 Section 14(1) of POCA.

3.13.13 Non-Conviction Based Forfeiture

POCA also makes provision for forfeiture without a requirement of a criminal conviction.

The Act establishes two scenarios under which forfeiture may be carried out without a criminal conviction. The first scenario is where an offender absconds.¹¹⁹ A court, upon application by the Attorney General, may grant a forfeiture order against a person's property upon proof that the person absconded while he was under investigation or he has been committed for trial for an offence.¹²⁰ A court may issue a forfeiture order if, having regard to all evidence brought before it, it is satisfied that a reasonable court lawfully could find the person guilty of the offence.¹²¹ One reason for establishing civil forfeiture is to bridge the obstacle of proof beyond reasonable doubt.¹²² The provisions of POCA do not serve fully the purpose of civil forfeiture because the Attorney General still has to adduce evidence that is sufficient to prove the guilt of an accused person beyond reasonable doubt.



The second scenario is where it is not possible to bring a person before a court on a charge of having committed a serious offence.¹²³ Where the Attorney General suspects, on reasonable grounds, that a person has acquired, holds or is dealing with a tainted property, he may apply to the High Court for an order to declare the property forfeited to the Republic. The Attorney General must prove that it is not possible to bring the person before a court to be charged with a serious offence, or that a foreign forfeiture or pecuniary penalty order cannot be made in respect of the person.¹²⁴ Upon a proof of either condition, the court may grant a forfeiture order if it is satisfied that the property is a tainted property

119 Section 12 of POCA.
120 Section 12(a) & (b) of POCA.
121 Section 12(c) of POCA.
122 Hofmeyer (2008: 137).
123 Section 30 of POCA.
124 Section 30(1)(a) & (b) of POCA.

and it is in the interests of justice to grant such an order.¹²⁵ The law does not prescribe the grounds that make it impossible to bring a person before a court. It is not clear whether insufficiency of evidence to prove criminal guilt of the person may be considered an acceptable ground for the impossibility of charging the person.

The scope of forfeiture in the second scenario (under section 30 of POCA) is narrow, in the sense that it covers only tainted property. A property of equivalent value to the benefits derived from the commission of an offence cannot be forfeited. Thus, if an offender cannot be brought to court and he manages to hide the actual proceeds, the Attorney General cannot pursue his other assets. Such a provision hinders the objectives of asset recovery which aim to ensure that crime does not pay under any circumstances.

3.13.14 Pecuniary Penalty Orders

In addition to forfeiture orders, POCA makes provisions for pecuniary penalty orders. The Attorney General may apply to a court for a pecuniary penalty order against a person in respect of the benefits derived by the person from the commission of an offence.¹²⁶ The application can be made after the person has been convicted of a serious offence.¹²⁷ The court may order the person to pay to the Treasury Registrar a pecuniary penalty equal to the value of the benefits derived from the commission of an offence.¹²⁸ Before granting the order, the court must satisfy itself that the person derived the benefits from the commission of an offence. Also, it must have assessed the value of the benefits so derived.

125 Section 30(2) of POCA.

126 Section 9(1)(b) of POCA.

127 Section 9(1) of POCA.

128 Section 21(1) of POCA.

A pecuniary penalty order may be executed in different ways. The government may execute the order through the normal process of recovering a civil debt¹²⁹ or through the forfeiture process provided in POCA. A court may order forfeiture of a person's property of corresponding value in order to satisfy a pecuniary penalty order.¹³⁰

Also, where a court makes a pecuniary penalty order against a person whose property is under the custody of a trustee, it may direct the trustee to dispose of such property and use the proceeds to pay to the Republic an amount equal to the amount of the pecuniary penalty order.¹³¹ It is for this reason that the court is empowered under section 38 to issue a restraint order against any property of an offender other than the tainted property. The aim is to make such property available to satisfy a pecuniary penalty order should a court issue it after conviction.

3.13.15 Standard of Proof for Forfeiture and Pecuniary Penalty Orders

The issuing of forfeiture and pecuniary penalty orders is the stage at which ownership of the designated property changes hands from the offender to the state. Applications for both forfeiture and pecuniary orders are made after conviction. The determining factors for granting such orders are whether a property is a tainted property or whether an offender derived benefits from the commission of a serious offence. The court must decide on these two issues upon proof on a balance of probability.¹³²

3.13.16 Rights of Third Parties at Forfeiture Stage

POCA takes into accounts the rights of persons who claim an interest in properties liable to a forfeiture order. Where the Attorney General makes application for a forfeiture order or a

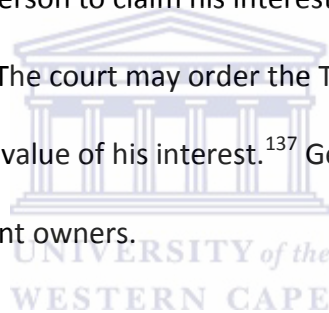
129 Section 21(7) of POCA.

130 Section 23(3) of POCA.

131 Section 44 of POCA.

132 Section 75 of POCA.

pecuniary penalty order, he is required to give notice of the application to any person whom he believes reasonably may have an interest in the property.¹³³ Further, the court may direct the Attorney General, at any time before final determination of the application, to give notice of the application to any other person as the court may consider appropriate.¹³⁴ Any person with an interest in the property may appear and adduce evidence at the hearing of application.¹³⁵ The court is required to exclude the person's interest in the property from forfeiture if it is satisfied that the person was not involved in any way in the commission of an offence or that he acquired the interest for sufficient value, without knowledge and in circumstances such as not to arouse reasonable suspicion that the property was tainted.¹³⁶ Moreover, POCA provides for a person to claim his interest in property even after a forfeiture order has been made. The court may order the Treasury Registrar to pay the claimant an amount equal to the value of his interest.¹³⁷ Generally, POCA provides adequate procedural safeguards for innocent owners.



3.13.17 Statute of Limitations

Limitation of the time available for the institution of criminal proceedings tends to be an obstacle to asset recovery. Luckily, Tanzanian criminal law does not create such an impediment. A person may be charged with an offence even if he committed it 50 years ago. However, POCA does impose a time limit with respect to recovering illicit assets. The Attorney General must make application for a forfeiture or a pecuniary penalty order within six months of the date of conviction.¹³⁸ Unfortunately, POCA does not make provision for

133 Section 10(1)(a) & (2) of POCA.
134 Section 10(1)(c) of POCA.
135 Section 10(1)(b) of POCA.
136 Section 16(6) of POCA.
137 Section 26(5) of POCA.
138 Section 9(1) of POCA.

the extension of such time limit in any circumstances. This omission might be a problem if it happens that the law enforcement agencies discover the offender's assets more than six months beyond the date of conviction.

3.13.18 International Co-operation

POCA recognises the importance of international co-operation in the fight against illicit properties. It empowers the domestic courts to enforce orders issued by foreign courts.¹³⁹

POCA makes reference to the provisions of the Mutual Assistance in Criminal Matters Act No 24 of 1991 (MACMA) because the latter is a main enactment governing international co-operation in all criminal matters. Thus, POCA must be read together with MACMA in respect of international asset recovery. MACMA dedicates significant space to regulating the proceeds of crime.

3.13.18.1 Identification and Tracing of Tainted Property

On the one side, the MACMA authorises the Attorney General to seek assistance in a foreign country in respect of the identification and tracing of tainted property.¹⁴⁰ The Attorney General can seek such assistance only if there are pending criminal proceedings or criminal investigations in Tanzania in relation to a specified offence. On the other side, MACMA empowers investigative agencies to exercise investigative powers provided under POCA if an appropriate foreign authority requests the AG to do so.¹⁴¹ The AG can authorise an investigative officer to trace a property if there are pending criminal proceedings or criminal investigations in a foreign country in relation to a specified offence.¹⁴²

139 Sections 18, 24 & 54 of POCA.

140 Section 31 of MACMA.

141 Section 33 of MACMA.

142 Section 33(1)(a) of POCA.

3.13.18.2 Foreign Preservation and Forfeiture Orders

The law allows for the enforcement of foreign preservation orders. Where the AG is requested by an appropriate foreign authority to enforce a preservation order, he may apply to the High Court to register such an order if it relates to a specified offence.¹⁴³ The High Court may register the order if it is satisfied that the order was properly made against the person concerned and such person was given an adequate opportunity to present his case.¹⁴⁴ An order registered by the High Court has the same legal force as an order issued by domestic courts under POCA.¹⁴⁵

Also, the law empowers domestic courts to enforce foreign forfeiture and pecuniary orders. The AG may apply to the High Court to register such orders if they relate to a specified offence. Before making the application, the AG must satisfy himself that a person has been convicted of a specified offence and that the conviction and order are not subject to appeal in a foreign country. The order registered by the High Court is enforceable in the same manner as an order issued by a domestic court.¹⁴⁶

The provisions on international co-operation in matters relating to fighting illicit assets fall short of international requisite measures. The law allows international co-operation in investigation and enforcement of asset recovery orders only where the offence for which co-operation is sought relates to a specified offence. A specified offence means a serious narcotic drugs and psychotropic substances offence.¹⁴⁷ Such a position of law cannot foster a successful fight against criminal assets. Currently, there are other offences, such as

143 Section 32(2) of MACMA.

144 Section 32(3) of MACMA.

145 Section 32(6) of MACMA and Section 54 of POCA.

146 Section 32(6) of POCA and Sections 18 & 24 of MACMA.

147 Section 3 of POCA.

corruption, tax evasion, human trafficking, piracy and terrorism, which produce a significant amount of cross-border illicit assets. Therefore, to limit international asset recovery co-operation to drugs offences, as MACMA does, is a hurdle for anti-illicit assets efforts.

3.13.18.3 Return of Forfeited Assets

The international community makes it an obligation for States Parties to return illicit assets to the victim state.¹⁴⁸ It is a mandatory obligation for a country to repatriate criminal proceeds to a country from which such proceeds were looted. MACMA takes into account this international obligation. It empowers the AG to order the return of forfeited property or its value to the requesting or victim state.¹⁴⁹ However, MACMA gives discretion to the government of Tanzania to return criminal proceeds to the victim country. This is contrary to UNCAC, which aims to make such return mandatory for each State Party.

3.13.18.4 Direct Recovery of Assets by a Foreign State

Direct recovery of property is one measure that broadens the scope of and facilitates the application of asset recovery. The international best practice encourages countries to adopt legislative measures that allow a foreign government to institute confiscation proceedings in their domestic courts.¹⁵⁰ Despite its challenges, such as costs and unfamiliarity with domestic laws, this procedure plays a critical role in recovering illicit assets as it avoids a prolonged process of assisted recovery.¹⁵¹ Tanzanian procedural laws yet are to allow for such a procedure. This remains an inadequacy in the domestic laws as it limits the scope of the international recovery of illegal assets.

148 Article 57 of UNCAC.

149 Section 32A of MACMA.

150 Article 53 of UNCAC.

151 Recovery through assistance of the government of a requested state.

3.14 Appeal Procedures

Appeal is a right under the Constitution of the United Republic of Tanzania.¹⁵² Any person who is aggrieved by a forfeiture order or pecuniary penalty order may appeal against such order.¹⁵³ The relevant section of POCA provides that the person may appeal in the same way as if the order were part of a sentence imposed on said person in respect of an offence for which the order was made.¹⁵⁴ This means that an aggrieved party has to follow procedures of appeal against a sentence provided for under Criminal Procedure Act.

However, POCA is silent on the procedures of appeal against preservation orders. This is a serious *lacuna* in the law, especially for the state. The state could find this omission quite challenging where a court declines to grant a preservation order, because if such decision is not appealed, it can frustrate the entire confiscation proceedings. Further, POCA does not say anything about the custody of a property pending an appeal by the state. The defendant might utilise such a gap in the law to dispose of a property and consequently defeat the whole purpose of forfeiture.

3.15 Conclusion

Generally, the Tanzanian legal framework recognises the importance of recovering criminal assets in the fight against economic criminality. It provides procedures which aim to facilitate the recovery of illicit properties. Furthermore, the procedures allow the confiscation of criminal proceeds obtained from a number of offences. However, such procedures are not free of weaknesses. The major shortcomings of the procedures and solutions thereto are discussed in detail in the next chapter.

152 Article 13(6)(a) of the Constitution.

153 Section 76 of POCA.

154 Section 76(1) & (2) of POCA.

Chapter Four

Improving Tanzania's Asset Recovery Legal Framework

4.1 Introduction

Asset recovery is a novel and complex phenomenon in the criminal justice field.¹ The understanding of judges and prosecutors on matters relating to asset recovery, particularly in the developing countries, is still poor.² There is little case law and literature on asset recovery across the world. Domestic laws, therefore, need to be as comprehensive as possible in order to facilitate the application of asset recovery by law enforcement agencies. Inadequacies in the law may frustrate the growing trend of recovering criminal assets as the designated authorities might find it difficult and tedious to apply confiscation provisions. Some judges still embrace the notion of proof beyond reasonable doubt in confiscation matters, instead of proof on a balance of probability.³ Without clear provisions setting out the standard of proof and other necessary procedural aspects of confiscation proceedings, such judges will continue to misapply the law, making the business of asset recovery more difficult.

It is against this backdrop that this chapter highlights the major deficiencies in the current legal framework. The aim is to throw light on such flaws and the consequences that might arise therefrom.

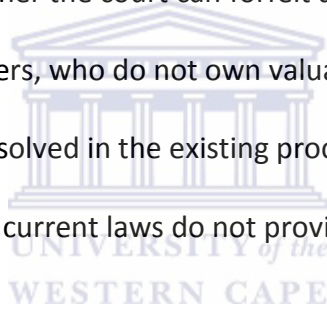
1 McCaw (2011: 196).

2 Paoli (2010: 265).

3 Paoli (2010: 265).

4.2 Determination of Joint Liability

Joint liability is the concept that is used in asset recovery to refer to the determination of the amount of benefits that a person derived from the commission of an offence. It is a pertinent concept in asset recovery, especially where the predicate offence was perpetrated by more than one person and there is no clear evidence as to the extent of benefits that each of them accrued. Usually, courts across the world are faced with the challenge of allocating individual liabilities where the actual benefits derived cannot be traced, there is no evidence as to the benefits to each offender, and there are few assets of corresponding value that might be used to satisfy a pecuniary penalty order. The issue that arises is how to apportion the liabilities and whether the court can forfeit assets of some offenders to cover benefits taken by their co-offenders, who do not own valuable assets, to satisfy pecuniary penalty order. This issue is not resolved in the existing procedures, making enforcement of asset recovery cumbersome. The current laws do not provide any guidance with respect to this issue.



4.3 Asset Management

Management of preserved and confiscated assets is an important aspect of the recovery process. Asset recovery aims not only to deprive criminals of their illicit wealth but serves also as a remedial measure to victims for the damage they suffered from the commission of predicate offences. It is through proper asset management that the latter can be achieved.⁴ This explains the need to have clear and effective measures on the management and allocation of forfeited assets. States are required to put measures in place that govern

4 MacCaw (2011: 196).

authorities designated to administer frozen and confiscated assets.⁵ The current legal framework in Tanzania does not seem to accord due attention to this requirement. It simply mentions that a court may appoint a trustee to take custody of a property subject to a restraint order. The law does not prescribe the qualifications of such trustee nor does it set out the rules to regulate his conduct while discharging his duties. The absence of clear and comprehensive provisions on the management of confiscated assets and the conduct of a trustee might be abused by a corrupt trustee to enrich himself or to conspire with the defendant to the detriment of the state.

Also, because the qualifications of a trustee are not specified, the court may appoint an incompetent trustee who may fail to manage the assets properly, thereby frustrating the objective of asset recovery. Furthermore, poor management of confiscated property may be an obstacle to recover assets from foreign countries. The practice shows that some countries would require assurance of proper management and allocation of confiscated property before they will agree to repatriate such properties.⁶

4.4 Prior Legitimate Owners and Victims

The term prior legitimate owner refers to the person who owned the property lawfully before it was stolen. International best practice places the interests of a prior legitimate owner prior to other interests in the confiscated assets. It requires that confiscated property be returned to its prior legitimate owner.⁷ The essential idea is that confiscated property must be used first to repair the damage caused by the offender before it can be allocated to other purposes, such as support to law enforcement agencies. Unfortunately, the current

5 Article 31(3) of UNCAC.

6 Monfrini (2008: 58).

7 Article 57(1) of UNCAC.

Tanzanian legal framework overlooks this aspect. It does not say anything about the fate of individual victims. All confiscated assets or their proceeds are vested in the Treasury Registrar,⁸ meaning that they are allocated for general government expenditure. The absence of provisions to prioritise the interests of prior legitimate owners and victims of a predicate offence may have two devastating effects on the country. One, the country may be denied co-operation by requested states to repatriate its confiscated assets. Two, the law enforcement agencies may not secure co-operation and assistance from members of the public if asset recovery is viewed as a means of raising revenue for the government rather than repairing damage suffered by the victims.⁹ Generally, the current legal framework is not victim-centred.

4.5 Intermingled Assets

The term intermingled assets means proceeds of crime which are mixed with legitimate wealth. This happens when a criminal uses illicit money to invest in an existing legitimate business. Usually, criminals choose to intermingle stolen proceeds in order to make it hard for investigators to trace the criminal origin of such funds. Practitioners concede that it is very difficult to identify criminal proceeds when they are commingled with licit wealth.¹⁰ Confiscation regimes need to find a better way of dealing with such proceeds because intermingling is used commonly by criminals. Some international instruments require countries to adopt measures that allow confiscation up to the value of intermingled criminal proceeds.¹¹ Some countries have adopted a much harsh approach to dealing with intermingled assets. In New Zealand, for example, where a person intermingles criminal

8 Sections 15(3) & 25(3) of POCA.

9 Arthur *et al* (1994: 243).

10 Schmid (2008: 233).

11 Article 31(5) of UNCAC.

proceeds with legitimate assets, the whole of the intermingled asset becomes liable to forfeiture.¹² The aim of such a strict approach is to deter offenders from using this *modus operandi* to frustrate law enforcement agencies. The current laws in Tanzania do not contain any measures in relation to confiscation of intermingled proceeds. The forensic investigators find it difficult to deal with such properties since it is not clear whether intermingled properties are liable to confiscation and, if so, to what extent.

4.6 Secondary Proceeds

Sometimes criminals invest criminal proceeds into businesses and make huge profits out of it. These profits are known as secondary proceeds. Funds stolen from public coffers are invested in private projects, such as construction companies and car shops, which generate profits. By the time the investigation unearths such criminal activities and starts to take counter measures, the criminal would have made a significant amount of profit out of money he stole from the treasury. International best practice resolved this issue by requiring States Parties to adopt laws that would enable their competent authorities to forfeit such generated profits, in addition to the actual proceeds.¹³

Unfortunately, this important aspect is yet to be addressed in the Tanzanian legal framework. The current laws focus on actual proceeds and properties into which proceeds have been transformed. There is no provision that permits the investigative agencies to pursue benefits or income derived from proceeds. Further, the courts are empowered only to forfeit tainted properties, which do not include benefits from criminal proceeds.¹⁴ The absence of provisions dealing with secondary proceeds may tend to encourage criminals to

12 Campbell (2010: 28).

13 Article 31(6) of UNCAC.

14 Sections 3 & 9 of POCA.

continue committing financial crimes, considering stealing to be a loan without interest. Stealing would become cost effective, in the sense that criminals would loot and make profits from public funds, and if they are caught they would return only the actual amount which they stole and retain the benefits. This weakness undermines the basic rationale of asset recovery, which is to ensure that crime does not pay.

4.7 Informal and Spontaneous Exchange of Information

Globalisation and digital technology have made national borders completely ineffective. Assets may travel across the world in a fraction of a second.¹⁵ They do not need passports to enter or leave a country. Investigative bodies need to keep pace with this trend in order to counter illicit assets. The conventional procedures of mutual assistance are inadequate to curb the current flow of illicit assets because of their formalistic nature, which tends to delay the process and allows criminals to dissipate their stolen assets and shield them from investigation. The modern approach to combating criminal assets requires proactive and spontaneous measures. Countries are encouraged to enact laws that permit their designated authorities to exchange information spontaneously and render one another necessary assistance outside formal channels, when it is necessary to do so.¹⁶

The current Tanzanian laws do not provide for this important tool in fighting illicit assets. They still embrace the old position which requires every kind of international assistance to be channeled formally, through the office of the Attorney General. Under existing laws, the investigative agencies, such as Prevention and Combating of Corruption Bureau and the police, have no authority to render assistance to their counterparts outside the formal route.

15 Schmid (2008: 231).

16 Articles 52(5) & 56 of UNCAC.

4.8 Expeditious Confiscation Proceedings

Prolonged confiscation proceedings pose a formidable challenge to asset recovery.¹⁷ The confiscation process needs quick and short procedures. Asset recovery matters must be determined quickly in order, firstly, to avoid concealment of assets and, secondly, to avoid both depreciation in value of recovered property and costs of managing property subject to a preservation order. Schmid notes that in many jurisdictions, judicial procedures are not renowned for being quick.¹⁸

Likewise in Tanzania, confiscation proceedings are not given the necessary priority by courts. A provisional application can take years to be concluded. In the case of *Mugesj*,¹⁹ it took about three years for the Court of Appeal to decide on an appeal by the Attorney General against a decision in which the High Court had refused to grant a preservation order. Such a tendency not only lowers the initiatives of law enforcement agencies but also erodes the public hope to see criminal assets being recovered. Despite this practical challenge, the current procedural laws do not set a time frame for disposing of confiscation matters nor do they require the courts to prioritise such matters.

4.9 Unexplained Wealth Procedure

This procedure refers to forfeiture of property based on the offender's failure to explain reasonably the licit origin of his properties. Given that criminals are ahead of governments in devising means to conceal the illicit origins of their properties, it is advised that countries should consider adopting this procedure.²⁰ The procedure is useful in the fight against illegal wealth, particularly in developing countries where the institutions still face acute problems

17 Paoli (2010: 268).

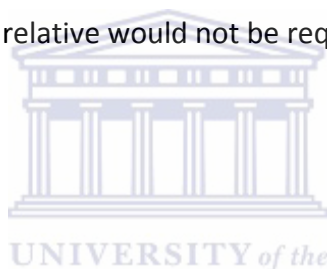
18 Schmid (2008: 235).

19 Criminal Appeal No 22 of 2011.

20 Article 31(8) of UNCAC.

of lack of investigative skills, financial resources and modern equipment. The provisions on unexplained wealth have proved effective in combating organised crime in countries such as the United Kingdom, Australia and Italy.²¹ In these countries, the provisions apply to every person who lives a criminal lifestyle.

In Tanzania, the law does introduce this procedure, but narrowly and indirectly. It establishes the offence of illicit enrichment, but only for public officials,²² thus leaving room for other types of criminals to enjoy their criminal fruits. Confiscation can work more effectively if this method applied to every person, irrespective of profession. A public official might not live a lavish lifestyle but he can let his girlfriend or relative do so. According to the current position, the girlfriend or relative would not be required to explain the licit origins of her or his lavish lifestyle.



4.10 Conclusion

The deficiencies identified above are fundamental to the poor functioning of the recovery process. Their continued existence in the Tanzanian legal framework makes the process more difficult for law enforcement agencies and hampers the efforts to counter ill-gotten wealth. Criminals may research these pitfalls and make Tanzania their safe haven. The existing legal framework, therefore, needs to be improved by addressing the identified gaps.

21 UNICRI (no date: 33).

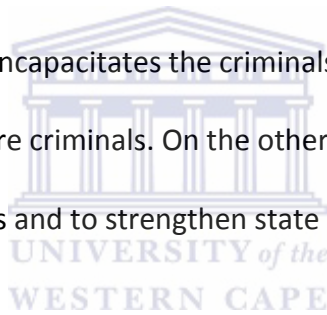
22 Section 27 of PCCA.

Chapter Five

Conclusion and Recommendations

5.1 Conclusion

The flow of illicit assets continues to pose a great threat to economic stability and security across the globe. Its main cause is economic criminality which is driven by people's greed to acquire excessive wealth in pursuit of a lavish life. Any option to counter such economic delinquency must consider the use of asset recovery. Asset recovery serves both retributive and restorative roles in combating crimes. On the one hand, it strips criminals of their criminal fruits and by doing so it incapacitates the criminals' economic base to fund other organised crimes and deters future criminals. On the other hand, it serves to redress damage, to control financial flows and to strengthen state efforts to combat economic criminality.



Asset recovery needs an integrated infrastructure in order to function effectively. It requires good procedural laws, designated institutions, skilled personnel, financial resources, political will and international co-operation. Procedures are a foundation on which other components of asset recovery can be constructed. Recovery of illicit assets is a fundamental weapon in combating economic criminality yet it is perilous to constitutional rights. The operation of asset recovery affects fundamental rights, such as the right to privacy and the right to own property. Therefore, the need to have procedures that take into account constitutional rights, on the one hand, and the necessity to combat criminal wealth, on the other hand, cannot be understated. Further, an effective confiscation regime needs

procedures that account for the current level of technology and innovation used by criminals to conceal the illicit origin of their wealth.

The existence of fourteen pieces of legislation, all containing provisions on asset forfeiture, is a clear indication that Tanzania is determined to fight illicit assets. However, more is to be done as regards the procedural laws. The existing procedures fall short of the requirements to curb the contemporary flow of tainted assets. It is through comprehensive and facilitative procedures that asset forfeiture can function efficiently and effectively.

5.2 Recommendations

5.2.1 A Single Confiscation Law

Currently, asset recovery is regulated across a number of statutes. This causes confusion and constitutes an unnecessary burden for the law enforcement agencies. Sometimes, the designated officer is obliged to make cross references to more than four statutes while pursuing confiscation proceedings. Such a situation is tedious and discourages prosecutors from invoking confiscation provisions. In addition, some statutes contain provisions which conflict with provisions of other statutes. For instance, Section 46(1) of the Drugs Act provides that confiscation under the Act should be carried out in accordance with the provisions of POCA. In meantime, section 11(1)(b) of the Drugs Act requires proceeds of confiscated property to be deposited into the Drugs Fund, whereas confiscated proceeds under POCA are vested in the Treasury Registrar.¹

1 Section 15(3) of POCA.

Asset forfeiture could be implemented easily if all the confiscation laws are merged into one piece of legislation. This not only will remove the problem of conflicting provisions but also will make the process of asset recovery easy for law enforcement agencies.

5.2.2 Designated Institutions

Criminal assets continue to increase and their effects are devastating to society. The process to recover such assets is tedious and devilishly demanding in terms of expertise and financial resources. The existing legal framework does not establish designated institutions to deal specifically with criminal assets. It imposes the duty of tracing illicit properties on ordinary institutions charged with conducting normal criminal investigations. This hampers recovery initiatives because these institutions are not staffed with skilled personnel and they spend most of their time in criminal investigations aimed at securing criminal convictions. Hitherto, only the DPP's office has had a special unit for asset recovery. Even this unit is established administratively, not by an act of parliament.²

Given the prevalence of illicit assets and the necessity to recover them, it is time to establish legally specialised and independent organs to deal with the investigation, prosecution and adjudication of asset recovery matters. Further, established organs should be given authority to make spontaneous communication with foreign authorities, outside the formal route. The presence of designated organs also will resolve the problem of inordinate delays in confiscation proceedings.

2 President's Office (June 2011).

5.2.3 International Co-operation

Illegal assets are not bound by political borders. Criminals make multiple transfers of assets across the world in order to make detection difficult. International co-operation between authorities is therefore a key tool in fighting transnational criminality. Currently, illicit assets are generated from a number of predicate offences, such as corruption, illicit trafficking in arms, mineral smuggling and tax evasion. It is not proper to continue limiting international co-operation in asset recovery to drugs related offences. The law should widen the scope of international co-operation to cover all predicate offences from which criminal proceeds are generated.

5.2.4 Special Account for Confiscated Properties

Asset management is an important element in the process of recovering assets. It is through proper asset management that the objectives of asset recovery, such as compensation of victims, can be achieved. A special account can serve to keep properly the proceeds of confiscated assets and to allocate such proceeds to the right persons or institutions.

Further, the existence of such a special account would make it easy to hold accountable those charged with its management. The current legal framework vests confiscated properties in the Treasury Registrar. The proceeds from such confiscated properties are allocated to government general expenditure. It is not easy to account for such proceeds nor can society perceive a difference between recovered assets and other government revenues.

A special account should be established legally, along with a committee to manage it.

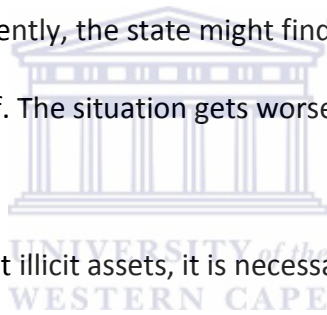
Proceeds of recovered assets should not be allocated to government general expenditure, but should be used to compensate victims and to strengthen law enforcement organs. The

establishment of a special account for recovered assets will make society see and feel the importance of asset forfeiture. Also, it will motivate the law enforcement agencies to increase their efforts in fighting criminal wealth.

5.2.5 Civil Forfeiture and Criminal Prosecutions

Civil forfeiture does not require a criminal conviction. In the current legal framework civil forfeiture can be resorted to only where criminal prosecution is impossible. That is to say, generally forfeiture under Tanzanian law can be carried out after a person has been prosecuted and convicted. Usually, criminal prosecutions take long. This makes forfeiture difficult and costly for the state. The state has to carry the costs of maintaining properties subject to preservation. Consequently, the state might find that it has incurred more costs than the value of a property itself. The situation gets worse when a court does not issue a forfeiture order in the end.

In order to bolster the war against illicit assets, it is necessary to introduce civil forfeiture as a parallel to criminal prosecutions. This will save the government time and money. Further, it will help to forfeit assets even if the evidence cannot prove the guilt of an offender beyond reasonable doubt. South Africa is an example where a such system has worked efficiently. Under section 50(4) of South Africa's Prevention of Organised Crime Act, the state may forfeit instrumentalities and proceeds of crime irrespective of the outcomes of criminal prosecutions.



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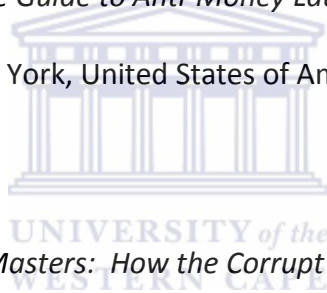
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